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No. 99-2085

In the Supreme Court of the United States

ERNESTO ALONSO MEJIA RODRIGUEZ, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court has jurisdiction under 28 U.S.C. 2241 to review petitioner's claim that he was unconstitutionally deprived of his opportunity to apply for suspension of deportation.

2. Whether petitioner's deportation proceedings denied him due process because petitioner's privately retained attorney failed to perfect his application for a purely discretionary form of relief from deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 178 F.3d 1139. The orders of the district court (Pet. App. 46a-49a, 50a-52a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 22, 1999. A petition for rehearing was denied on March 29, 2000. Pet. App. 68a-69a. The petition for a writ of certiorari was filed on June 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. With the passage in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996), Congress enacted several major

changes to the Nation's immigration laws. Those changes were designed, in large part, to reduce the opportunities for criminal aliens to obtain administrative relief from deportation and to expedite their removal from the United States by restricting and streamlining judicial review of their deportation orders.

a. Prior to the 1996 legislation, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident. 8 U.S.C. 1254(a) (1994). Such relief was available in the discretion of the Attorney General. To qualify for consideration for suspension of deportation, the alien was required to demonstrate, *inter alia*, that he had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application [for relief]," that he was of "good moral character," and that his deportation would result in "extreme hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) (1994). The alien could obtain judicial review of a final order of deportation (which included any denial of discretionary relief from deportation) by filing a petition for review in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*). In addition, under certain circumstances, an alien held in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. IIRIRA abolished the old distinction between deportation and exclusion proceedings, repealed the

provision for suspension of deportation in former 8 U.S.C. 1254(a) (1994), instituted a new form of proceeding known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal," which replaced the prior provisions for discretionary suspension of deportation and for waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994). See 8 U.S.C. 1229, 1229b (Supp. IV 1998). The Attorney General may, in her discretion, cancel the removal of an alien if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is a lawful permanent resident) or has been continuously present here for ten years (if the alien is not a lawful permanent resident), is of good moral character, and his removal would cause extreme hardship to a spouse or child. 8 U.S.C. 1229b(a) and (b) (Supp. IV 1998).

c. Also in 1996, Congress twice restricted the availability of judicial review of criminal aliens' deportation orders. First, Section 401(e) of AEDPA—which is entitled "Elimination of Custody Review by Habeas Corpus"—eliminated the authorization in 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996) for aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. 110 Stat. 1268. AEDPA replaced that habeas corpus provision with a new 8 U.S.C. 1105a(a)(10), which provided that any final order of deportation against an alien who was deportable for having committed certain criminal offenses "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1277.

Second, IIRIRA created an entirely new judicial review provision in 8 U.S.C. 1252 (Supp. IV 1998), for cases in which aliens were placed in removal pro-

ceedings on or after April 1, 1997. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625.[1] Cases commenced prior to April 1, 1997, including this case, continue to be governed by 8 U.S.C. 1105a, as amended by AEDPA. IIRIRA § 309(c)(2), 110 Stat. 3009-626. Congress also enacted special transitional rules for any cases commenced prior to April 1, 1997, in which the final deportation order was entered on or after October 31, 1996. One such rule reinforces the preclusion of judicial review in amended Section 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626.

2. a. Petitioner is a native and citizen of Honduras who initially entered the United States in 1980 as a non-immigrant visitor for pleasure. Pet. App. 3a. In

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[1] The new Section 1252 provides for judicial review of all final removal orders in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998). Section 1252 also carries forward the preclusion of review in former Section 1105a(a)(10) (as amended by AEDPA Section 440(a)) by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" any one of a number of specified crimes. 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). The new Section 1252(b)(9) further provides sweepingly that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section" —*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1). See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (characterizing Section 1252(b)(9) as an "unmistakable 'zipper' clause").

1986, petitioner was convicted in a Florida state court of trafficking in cocaine, based on a plea of *nolo contendere*. *Ibid.* In March 1990, the INS commenced deportation proceedings against petitioner and charged him with deportability as an alien who had entered the United States without inspection and as an alien convicted of a controlled substance violation. See 8 U.S.C. 1251(a)(2) and (11) (1988). Pet. App. 4a. In December 1990, the INS withdrew those charges and charged petitioner instead with overstaying his non-immigrant visa. *Ibid.*

In August 1991, an immigration judge found petitioner deportable as charged. Pet. App. 5a, 64a-67a. The immigration judge also denied petitioner's request for suspension of deportation under 8 U.S.C. 1254(a) (1988), on the ground that his drug conviction prevented him from making the requisite demonstration of good moral character, see 8 U.S.C. 1101(f) (1988). Pet. App. 67a.

In January 1994, the Board of Immigration Appeals dismissed petitioner's appeal. Petitioner did not seek judicial review of that decision. Pet. App. 7a, 54a. When the INS sought to execute petitioner's final order of deportation, petitioner absconded and remained a fugitive from justice for over two years. *Id.* at 7a-8a.

b. In May 1997, while he remained a fugitive from deportation, petitioner filed a writ of error *coram nobis* with the Florida state court, seeking vacatur of his drug trafficking conviction on the ground that he was not adequately informed of the immigration consequences of his *nolo contendere* plea. Pet. App. 7a-8a. The state court granted the petition, and the State's Attorney then announced a *nolle prosequi* of the charges against petitioner. *Id.* at 8a.

Four months later, the INS took petitioner into custody to execute his two-year old final order of deportation. Pet. App. 8a. At that time, petitioner filed a motion to reopen his deportation proceedings with the immigration judge and the BIA, citing the recent vacatur of his conviction. *Ibid.* The immigration judge refused to accept the motion and, in November 1998, the Board denied petitioner's motion to reopen because it was filed almost a year beyond the time limit established by 8 C.F.R. 3.2(c)(2). On December 14, 1998, petitioner filed a petition for review of the Board's denial of his motion to reopen in the court of appeals. Pet. App. 9a.

c. While his motions before the immigration judge and Board were pending, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida, seeking a stay of his deportation, release from custody, and a hearing on his application for relief from deportation. Pet. App. 9a. The district court denied the habeas petition and stay request. *Ibid.* Petitioner sought reconsideration, which the district court also denied. *Id.* at 50a. In November 1997, petitioner filed a renewed petition for a writ of habeas corpus. In March 1998, the district court dismissed the renewed petition. *Id.* at 46a.

3. The court of appeals subsequently issued a consolidated decision on the petition for review that petitioner filed directly in that court and on petitioner's appeal from the district court's denial of habeas corpus relief. Pet. App. 1a-23a.[2] As an initial matter, because

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[2] The court of appeals initially had affirmed the district court's dismissal of the habeas corpus petition on the ground that 8 U.S.C. 1252(g) (Supp. IV 1998), as added by IIRIRA, barred district court jurisdiction. Pet. App. 39a-40a. However, the court of appeals

petitioner had conceded in his brief that judicial review of the Board's decision on direct review would moot the necessity of reviewing the district court's dismissal of his habeas corpus action (due to the similarity of the claims raised in each forum), the court of appeals reviewed only the Board's decision and dismissed as moot petitioner's appeal from the district court's order dismissing his habeas petition. *Id.* at 11a. The court of appeals thus had no occasion to address whether habeas jurisdiction properly resided in the district court.

The court of appeals also declined to decide whether petitioner's case fell under IIRIRA's transitional rules for judicial review (because his deportation proceedings commenced prior to April 1, 1997) or under IIRIRA's permanent rules (because his motion to reopen was filed after that date). Pet. App. 12a. Resolution of that question was unnecessary, the court explained, because the court "would have jurisdiction over [petitioner's] petition for review under either the pre-IIRIRA or post-IIRIRA [law]." *Ibid.*

On the merits, the court of appeals ruled that the Board did not abuse its discretion or violate due process in denying petitioner's motion to reopen as untimely. Pet. App. 13a. The court reasoned that, "even assuming that [petitioner] suffered a constitutional violation in his deportation proceedings, the application of the limitations period from 8 C.F.R. § 3.2(c)(2) does not raise constitutional concerns merely because it leaves [petitioner] without a remedy for vindicating his assumed constitutional injury." Pet. App. 14a.

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vacated that ruling following this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, *supra*. Pet. App. 26a-27a.

The court of appeals also rejected petitioner's claim of ineffective assistance of counsel, which petitioner had not presented to the Board. Pet. App. 15a-22a. The court of appeals held that any ineffectiveness in counsel's handling of petitioner's application for discretionary suspension of deportation did not violate due process because the failure to receive an "act of grace," *id.* at 19a, in the form of the purely discretionary relief of suspension of deportation, does not amount to a deprivation of a constitutionally-protected liberty interest, *id.* at 17a. The court reasoned that petitioner's "actual chances of receiving such discretionary relief are too speculative, and too far beyond the capability of judicial review, to conclude that the alien has actually suffered prejudice from being ineligible for suspension of deportation." *Id.* at 20a. The court further concluded that, in any event, petitioner had not established prejudice as a result of counsel's alleged deficiency, because he had not made a strong showing of extreme hardship if he was returned to Honduras.

ARGUMENT

1. Petitioner seeks (Pet. 9-22) this Court's review of the question whether, following IIRIRA, habeas corpus jurisdiction exists under 28 U.S.C. 2241 to challenge a final order of deportation. While petitioner is correct that a conflict in the circuits exists on that question (Pet. 10-11), this case does not present that question. Based on petitioner's representation that his petition for review of the Board's decision encompassed all of the claims raised in his habeas corpus action, Pet. App. 11a, the court of appeals dismissed petitioner's appeal from the district court's decision on his habeas petition as moot, and petitioner has not challenged that aspect of the court of appeals' decision here. The court of

appeals thus did not address the jurisdictional question that petitioner asks this Court to review, and it is entirely unnecessary to the resolution of petitioner's case.

Even if the case did present the jurisdictional question, further review would be unwarranted. Petitioner's challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court over a year ago in *Reno* v. *Goncalves*, 526 U.S. 1004 (1999), and *Reno* v. *Navas*, 526 U.S. 1004 (1999), as well as the certiorari petitions filed by aliens and denied by this Court more recently in *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000), and *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000). Especially given that petitioner's appeal of the district court's dismissal of his habeas petition was dismissed as moot, there is no basis in this case for a different disposition. Furthermore, like those cases, this case concerns only issues of jurisdiction relating to deportation proceedings commenced before April 1, 1997, the date on which IIRIRA's permanent judicial review provisions took effect. The number of cases affected by those transitional rules is dwindling, further diminishing the necessity for this Court's review.[3]

2. Petitioner also seeks (Pet. 22-29) this Court's review of the court of appeals' ruling that his due process rights were not infringed by the allegedly ineffective assistance rendered by his privately retained counsel. The court of appeals reasoned that, even if counsel's

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[3] Petitioner's contention (Pet. 15-18) that this case provides an appropriate vehicle for reviewing the availability of habeas jurisdiction under IIRIRA's permanent rules runs even further afield because his case arises under IIRIRA's transitional rules and thus simply does not present that question.

performance had been defective, petitioner had not established a due process violation because (1) "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest," and (2) petitioner had not, in any event, made a showing of prejudice—an essential element of an ineffective assistance of counsel claim—by showing a likelihood that he would have been granted relief. Pet. App. 17a, 21a n.8, 22a.

It is not clear to what extent the court of appeals in this case intended those two points to be distinct grounds for rejecting petitioner's claim, rather than mutually reinforcing reasons why petitioner had not made a sufficient showing that counsel's allegedly deficient performance may have affected the ultimate outcome of his case. To the extent the two points reflect distinct grounds of decision, the Eleventh Circuit's ruling on the first of those two grounds is inconsistent with the Ninth Circuit's decision in *Castillo-Perez* v. *INS*, 212 F.3d 518 (2000), which found that an alien's failure to apply for suspension of deportation—the same relief petitioner seeks—was due to ineffective assistance of counsel that violated the Due Process Clause, *id.* at 526-527. The Ninth Circuit in *Castillo-Perez*, however, did not address the rationale, set out by the Eleventh Circuit in this case, for why an interest protected by the Due Process Clause may not be implicated in the context of an application for discretionary relief.

The first of the two grounds articulated by the court of appeals in this case is also in substantial tension with *Rabiu* v. *INS*, 41 F.3d 879 (2d Cir. 1994), and *Miranda-Lores* v. *INS*, 17 F.3d 84 (5th Cir. 1994), where the Second and Fifth Circuits held that counsel's failure to seek the discretionary relief of waiver of deportation

violates the Due Process Clause if the alien makes a prima facie showing of eligibility for the relief and a strong showing that discretion likely would have been exercised favorably, taking into account the relevant discretionary considerations. *Rabiu*, 41 F.3d at 882; *Miranda-Lores*, 17 F.3d at 85.

Moreover, the Eleventh Circuit's decision also appears to be contrary to intervening Board precedent. The decision of the Board in *Castillo-Perez, supra*, contemplated that an ineffective assistance of counsel claim will lie in connection with an application for suspension of deportation. *In re Hugo Castillo-Perez*, No. A70 779 196 (BIA July 27, 1999). The Board ultimately denied relief, however, on the ground that an intervening change in the law had rendered Castillo-Perez ineligible for suspension of deportation, but the court of appeals reversed the Board in that respect. 212 F.3d at 528.

3. Despite the tensions between those court of appeals decisions and the decision issued here, plenary review by this Court of the question whether counsel's errors in connection with a possible claim for discretionary relief from deportation can constitute a due process violation would be inappropriate at the present time. In the first place, petitioner did not present his due process claim of ineffective assistance of counsel in the deportation proceedings to the Board, and he therefore neither complied with the procedural requirements of *In re Lozada*, 19 I. & N. Dec. 637 (BIA), aff'd, 857 F.2d 10 (1st Cir. 1988), for presenting such a claim, nor exhausted his administrative remedies on the issue. The Ninth Circuit in *Castillo-Perez* excused compliance with *Lozada* in that case on the ground that counsel's ineffectiveness was apparent on the face of the record. 212 F.3d at 525-526. That is not true here. That

procedural default, which did not occur in *Castillo-Perez*, deprived the Board of the opportunity to consider petitioner's claim on the merits.[4]

Second, in finding a due process violation in *Castillo-Perez*, the Ninth Circuit specifically concluded that the alien had demonstrated prejudice entitling him to relief. 212 F.3d at 527 n.12. The Second and Fifth Circuits similarly held in *Rabiu* and *Miranda-Lores* that a showing of a likelihood of a favorable exercise of discretion was necessary for relief. See *Rabiu*, 41 F.3d at 883; *Miranda-Lores*, 17 F.3d at 85. The Eleventh Circuit in the present case found that petitioner had not made such a showing. Pet. App. 17a.

Third, and more significantly, plenary review is not warranted in this case because the Board of Immigration Appeals has recently ordered briefing, in the case of *In re Maria Rosario Cabral Cruz*, No. A73 419 214 (order issued Sept. 15, 2000), on the predicate question of whether a claim of ineffective assistance of privately retained counsel in immigration proceedings implicates the Due Process Clause at all, in light of this Court's decisions in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), and *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982), discussed below. See also *In re Ingabire*, No. A76 451 961 (BIA Aug. 8, 2000), slip op. 3-6 (Filppu, Board Member, concurring) (expressing the view that ineffective assistance of privately retained counsel in deportation proceedings does not implicate the Due Process Clause).

While an alien has some due process rights in deportation proceedings, see, *e.g.*, *Landon* v. *Plasencia*,

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[4] The Eleventh Circuit did not decide the procedural default issue because it found petitioner's claim to be without merit in any event. Pet. App. 11a-12a n.4.

459 U.S. 21, 32-33 (1982), because deportation proceedings are civil in nature, *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 490; see also *id.* at 491 (interests of individuals in deportation proceedings are "less compelling than in criminal prosecutions"); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) (deportation proceeding "is a purely civil action to determine eligibility to remain in this country" prospectively), an alien facing deportation proceedings has no constitutional right to government-provided counsel.[5]

Nevertheless, numerous courts have held, like the Eleventh Circuit here (Pet. App. 16a-17a), that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Lopez* v. *INS*, 775 F.2d 1015, 1017 (9th Cir. 1985); see also *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017, 1019-1020 (6th Cir. 1999);

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[5] See *Montilla* v. *INS*, 926 F.2d 162 (2d Cir. 1991); *Gandarillas-Zambrana* v. *BIA*, 44 F.3d 1251, 1256 (4th Cir.), cert. denied, 516 U.S. 806 (1995); *Ogbemudia* v. *INS*, 988 F.2d 595, 598 (5th Cir. 1993); *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Singh* v. *Waters*, 87 F.3d 346, 347 (9th Cir. 1996); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999); *Maldonado-Perez* v. *INS*, 865 F.2d 328, 332-333 (D.C. Cir. 1989). At the time of petitioner's hearing before the immigration judge, Congress had provided by statute that an alien in deportation proceedings shall "have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1252(b)(2) (1994) (amended 1996). A similar provision applies post-IIRIRA. 8 U.S.C. 1229(a)(1)(E) and (b), 1229a(b)(4)(A) (Supp. IV 1998). Aliens thus have no statutory right to government-provided counsel either.

Rabiu, 41 F.3d at 882; *Henry* v. *INS*, 8 F.3d 426, 440 (7th Cir. 1993); *Lozada* v. *INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Paul* v. *INS*, 521 F.2d 194, 197-198 (5th Cir. 1975). The Board itself has acknowledged this right, in light of circuit precedent. See *In re Lozada*, 19 I. & N. Dec. 637, 638 (BIA) (citing court of appeals decisions), aff'd, 857 F.2d 10 (1st Cir. 1988).

No circuit, however, has analyzed or revisited the question of whether ineffective, privately retained counsel implicates the Due Process Clause in light of this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722 (1991). In *Coleman*, this Court held that, because there is no constitutional right to an attorney in state postconviction proceedings, an incarcerated prisoner "cannot claim constitutionally ineffective assistance of counsel in such proceedings," *id.* at 752. It is only where the Constitution itself requires effective counsel that the ineffectiveness of counsel can be "imputed to the State," as in criminal trials where the Sixth Amendment applies. *Id.* at 754. This Court, moreover, specifically stated that the "fundamental fairness" component of the Due Process Clause—which is what courts have relied on in the immigration context—does not itself guarantee effective counsel in habeas proceedings, even where the petitioner faces a death sentence. *Id.* at 756. Rather, in habeas proceedings, the petitioner "must 'bear the risk of attorney error,'" "ignorance or inadvertence." *Id.* at 753. See also *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."); *id.* at 588 n.4 ("Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such

deprivation—even if implicating a due process interest —was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law.").

If the Board concludes in *Cruz* that, in light of *Coleman*, it will no longer recognize a due-process-based claim of ineffective assistance of privately retained counsel in a deportation proceeding, then the foundation for the current divergence of views in the courts of appeals on which types of attorney errors might violate the Due Process Clause will be substantially eroded, making this Court's review of that question unnecessary. Such a decision by the Board would also likely lead the courts of appeals to revisit their ineffective assistance of counsel holdings in light of *Coleman*. This Court's review of that constitutional question should properly await initial consideration and analysis by the lower courts. Finally, even if the Constitution does not require the effective assistance of counsel in deportation proceedings, the Board could decide as a matter of administrative discretion to reopen cases in certain circumstances when ineffective assistance of counsel is demonstrated. In that context, however, the Board would have substantial discretion to identify the level and types of attorney errors that will trigger reopening. It is thus appropriate to permit the Board to address these questions in the first instance.

Accordingly, in light of this Court's decision in *Coleman* and the now unsettled status of ineffective assistance claims in deportation proceedings, we suggest that the Court grant the petition for a writ of certiorari limited to the second question presented, vacate the judgment of the court of appeals, and remand the case

to the court of appeals with instructions to remand the case to the Board of Immigration Appeals for disposition in light of the Board's eventual decision in *In re Maria Rosario Cabral Cruz*, No. A73 419 214, concerning the application of *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted limited to the second question presented, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand the case to the Board of Immigration Appeals for disposition in light of the Board's eventual decision in *In re Maria Rosario Cabral Cruz*, No. A73 419 214, concerning the application of *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

Respectfully submitted.

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